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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 811

MORRELL J. RODDY, *Petitioner*,

v.

CIVIL AERONAUTICS BOARD, and the ADMINISTRATOR OF THE FEDERAL AVIATION AGENCY, *Respondents*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

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OPINION BELOW

The opinion of the Court of Appeals, printed in the Appendix hereto, is not yet reported.

JURISDICTION

The judgment of the Court of Appeals affirming the Board's order was entered on February 1, 1962, and appears in the Appendix hereto. A petition for rehearing and for hearing en banc was denied by the Court of Appeals on February 23, 1962. C.R. 90-91.*

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* C.R. refers to the certified record filed in this court.

The jurisdiction of this court is invoked under 28 U.S.C. 1254(1) and Sec. 1006(f) of the Federal Aviation Act (1958); 72 Stat. 795, 49 U.S.C. 1486.

QUESTION PRESENTED

Whether certain letters, written by the Administrator of the Federal Aviation Agency to the Civil Aeronautics Board in violation of the Principles of Practice of the Board are so prejudicial, even though served, as to require that the order of the Board revoking all piloting privileges held by the petitioner be set aside and proceedings in respect thereto reopened.

CONSTITUTIONAL PROVISIONS, STATUTES AND PRINCIPLES AND RULES OF PRACTICE INVOLVED

The Constitutional provision involved is the due process clause of the Fifth Amendment. The statutes involved are the Federal Aviation Act of 1958, 72 Stat. 795, 49 U.S.C. 1486, and the Administrative Procedure Act, 60 Stat. 243, 5 U.S.C. 1009. The pertinent provisions of the Federal Aviation Act and of the Administrative Procedure Act are set forth in the Appendix hereto.

The Principles of Practice involved are those of the Civil Aeronautics Board, the pertinent provisions of which are set forth in the Appendix.

STATEMENT OF THE CASE

This case grew out of an incident at the Pittsburgh airport on March 23, 1960, when the petitioner, Morrell J. Roddy, then a Capital Airlines air transport captain, in charge of a flight from Tampa to Buffalo permitted, according to the findings of the Civil Aeronautics Board, without proper authorization, another

Capital Airlines captain to fly the plane, a Constellation, from Pittsburgh to Buffalo. The substituted captain had approximately 3,000 hours flying time in Constellations, and the flight involved was completely successful.

As a result of this incident, the Administrator issued an order on May 3, 1960, pursuant to Section 609 of the Federal Aviation Act of 1958, 72 Stat. 779, 49 U.S.C. 1429, revoking the Airline Transport Pilot Certificate, together with all ratings and privileges attached thereto, held by the petitioner. An appeal was taken by your petitioner to the Civil Aeronautics Board as is also provided by Section 609 of the Federal Aviation Act. The Civil Aeronautics Board hearing examiner's initial decision dated November 4, 1960, modified the Administrator's order to the extent of revoking the petitioner's airline transport rating, but permitting the petitioner to fly as a co-pilot.

The Administrator appealed from this initial decision, insisting that the examiner erred in not affirming the Administrator's order and revoking all of the piloting privileges held by the petitioner.

Following the Administrator's appeal, the Board revoked all airman pilot certificates, ratings, and privileges held by the petitioner, thus reinstating the sanction imposed by the Administrator of the Federal Aviation Agency. This order appears at C.R. 28-29.

While the Administrator's appeal to the quasi-judicial Civil Aeronautics Board was pending, the General Counsel of the Federal Aviation Agency and the Administrator of the Federal Aviation Agency both wrote letters to the Board, without service on the petitioner and in conceded violation of the Principles of Practice of the Board.

Ostensibly requests for oral argument and expeditious decision, the letters contain such phrases as "safety in air commerce," the "public interest" and "the unauthorized substitution of captains." These letters appear at C.R. 19-21.

The Chairman of the Board, approximately three weeks later, replied to these letters, stating, inter alia: "Examination of these letters discloses that they are in effect motions for oral argument and expeditious decision and rely in part upon facts not of record. It further appears that neither of these letters shows service on the respondents. *In such circumstances, the Board cannot properly consider your letters.* (Emphasis supplied.) However, because of the possible relationship between your requests and air safety, we are undertaking to cure the legal deficiencies involved by serving copies of the letters upon the respondents."

The issue of the Administrator's letters was raised by the petitioner on reconsideration as provided by Board rules, C.R. 48-57. In that connection, the Board stayed the sanction imposed on the petitioner pending appeal, thus permitting the petitioner to fly as a co-pilot, but not as a captain. This order appears at C.R. 78-82.

REASONS FOR GRANTING THE WRIT

1. The decision of the Court of Appeals in this case is contrary to the due process clause of the Fifth Amendment to the Constitution of the United States and has deprived the petitioner of inherent legal rights.

2. The opinion in this case is in conflict with the opinion of this Court in *United States ex rel Accardi v. Shaughnessy*, 347 U.S. 260 (1954) and *Sangamon*

Valley Television Corporation v. Federal Communications Commission, 358 U.S. 49 (1958), reversing 255 F. 2d 191 (D.C. Cir. 1958); after remand, 106 U.S. App. D.C. 30, 269 F. 2d 221 (1959).

3. The serious consequences to petitioner, a pilot with over 17 years experience, including military service, without a blemish, should be considered by the Court in acting on the petition. He seeks merely an untainted appeal to the Board.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

CHARLES E. ROBBINS
Counsel for Petitioner

APPENDIX A

The pertinent provisions of the Federal Aviation Act are as follows:

Section 609 (72 Stat. 779, 49 U.S.C. 1429):

"The Administrator may, from time to time, reinspect any civil aircraft, aircraft engine, propeller, appliance, air navigation facility, or air agency, or may reexamine any civil airman. If, as a result of any such reinspection or reexamination, or if, as a result of any other investigation made by the Administrator, he determines that safety in air commerce or air transportation and the public interest requires, the Administrator may issue an order amended, modifying, suspending, or revoking, in whole or in part, any type certificate, production certificate, airworthiness certificate, airman certificate, air carrier operating certificate, air navigation facility certificate, or air agency certificate. Prior to amending, modifying, suspending, or revoking any of the foregoing certificates, the Administrator shall advise the holder thereof as to any charges or other reasons relied upon by the Administrator for his proposed action and, except in cases of emergency, shall provide the holder of such a certificate an opportunity to answer any charges and be heard as to why such certificate should not be amended, modified, suspended, or revoked. Any person whose certificate is affected by such an order of the Administrator under this section may appeal the Administrator's order to the Board and the Board may, after notice and hearing, amend, modify, or reverse the Administrator's order if it finds that safety in air commerce or air transportation and the public interest do not require affirmation of the Administrator's order. In the conduct of its hearings the Board shall not be bound by findings of fact of the Administrator. The filing of an appeal with the Board shall stay the effectiveness of the Administrator's order unless the Administrator advises the Board that an emergency exists and safety in air commerce or air transportation requires the immediate effectiveness of his order, in which event the order shall remain effective and the Board shall finally dispose of the appeal within sixty days after being so advised by the Administrator. The person substantially affected by the

Board's order may obtain judicial review of said order under the provisions of section 1006, and the Administrator shall be made a party to such proceedings."

The pertinent provisions of the Principles of Practice of the Civil Aeronautics Board are as follows:

Section 300.2(a) (14 C.F.R. Sec. 300.2 (a)):

"Hearing cases; improper influence. It is essential in cases to be determined after notice and hearing and upon a record that the Board's judicial character be recognized and protected. In such cases:

(a) It is improper that there be any private communication on the merits of the case to a member of the Board or its staff or to the examiner in the case by any person, either in private or public life, unless provided by law."

(c) It is improper that there be any effort by any person interested in the case to sway the judgment of the Board by attempting to bring pressure or influence to bear upon the members of the Board or its staff, or that such person or any member of the Board's staff, directly or indirectly, give statements to the press or radio, by paid advertisements or otherwise, designed to influence the Board's judgment in the case."

The pertinent provisions of the Administrative Procedure Act are as follows:

Section 10 (e) (5 U.S.C. 1009 (e), 60 Stat. 243):

"So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limita-

tions or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of section 1006 and 1007 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error."

(Filed Feb. 1, 1962)

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1961

No. 16515

MORRELL J. RODDY, *Petitioner*,

v.

CIVIL AERONAUTICS BOARD and the ADMINISTRATOR OF THE FEDERAL AVIATION AGENCY, *Respondents*.

On Petition for Review of an Order of the Civil Aeronautics Board.

Before: WILBUR K. MILLER, Chief Judge, and EDGERTON and FAHY, Circuit Judges.

Judgment

This case came on to be heard on the record from the Civil Aeronautics Board, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this court that the order of the Civil Aeronautics Board on review in this case is affirmed.

PER CURIAM.

Dated: February 1, 1962.

Opinion

(Filed Feb. 1, 1962)

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16515

MORRELL J. RODDY, *Petitioner*

v.

CIVIL AERONAUTICS BOARD and the ADMINISTRATOR OF THE FEDERAL AVIATION AGENCY, *Respondents*

On Petition for Review of an Order of the Civil Aeronautics Board

Decided February 1, 1962

Mr. Charles E. Robbins, with whom *Mr. Benedict F. Fitzgerald, Jr.*, was on the brief, for petitioner.

Mr. William F. Becker, Attorney, Civil Aeronautics Board, with whom *Messrs. John H. Wanner*, General Counsel, Civil Aeronautics Board, *Joseph B. Goldman*, Deputy General Counsel, Civil Aeronautics Board, and *O. D. Ozment*, Associate General Counsel, Litigation and Research, Civil Aeronautics Board, were on the brief, for respondent Civil Aeronautics Board.

Mr. James D. Hill, Associate General Counsel, Enforcement, Litigation and Claims, Federal Aviation Agency, for respondent Federal Aviation Agency.

Before WILBUR K. MILLER, *Chief Judge*, and EDGERTON and FAHY, *Circuit Judges*.

PER CURIAM: Petitioner asks review of the revocation of his airman pilot certificates, ratings and privileges. 72 STAT. 795, 49 U.S.C. § 1486 (1958). We find no error affecting substantial rights.

Affirmed.